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RES IPSA LOQUITUR AS APPLIED TO INJURY TO PATIENT IN HOSPITAL

The rule is that a hospital that is conducted for private gain receives patients under an implied obligation that it will exercise ordinary care and attention for their safety, and such degree of care and attention should be in proportion to the physical and mental ailments of the patient, and the question whether or not such requirements have been met presents an issue of fact to be determined by the jury. Tulsa Hospital Association v. Juby, 175 Pacific 519, 22 A. L. R. 333, decided by the Supreme Court of Oklahoma.

In Richardson v. Dumas, 106 Miss. 664, 64 Southern 459, the agreement with a private sanitarium provided for the furnishing of a trained nurse, night and day, for the patient, who was very ill and delirious. The evidence showed that about 12 o'clock at night he was found on the pavement in the yard of the sanitarium, having apparently fallen from a window to the pavement, a distance of about nineteen feet, and that he died the following day. It was held that these facts showed a prima facie case of negligence on the part of those in charge of the sanitarium, in failing to exercise due care in nursing and guarding the patient.

Action was brought to recover for the death of a patient while in a sanitarium, on the theory that he had negligently been permitted to roam about in his delirium and to fall from the porch or stairs. The trial court instructed that negligence should not be presumed from the circumstances of the death, but that it was incumbent on the plaintiff to prove such facts of negligence on the part of the defendants as were alleged. This instruction was held to be erroneous, and not to be sustainable on the theory that it was merely a declaration that the doctrine of res ipsa loquitur did not apply. The court held that this was especially true in view of a refusal to add a modification permitting the jury to take into consideration the circumstances proved in connection with the injury and death and the specific objection made to the instruction that the plaintiff's proof consisted of a series of circumstances, and that it, in effect, told the jury that they should not consider the circumstances. Durfee v. Dorr, 131 Ark. 369, 199 S. W. 376.

In Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453, it appeared that while a patient was under the influence of an anesthetic, after an operation, and was burned by hot water bags, the court held that the doctrine was applicable whether the liability of the hospital was based on negligence of its nurses or in its failure to select competent nurses.

In Meyer v. McNutt Hospital, 173 California 156, 159 Pacific 436, the plaintiff sued the hospital on account of injuries caused by alleged negligence of the defendant's employees in allowing the plaintiff to be burned by a hot water bottle while she was unconscious from the effects of an anesthetic. The court held that the doctrine was applicable and that circumstantial evidence was sufficient to show negligence, so as to sustain a judgment for the plaintiff, although there was no direct testimony to the effect that any servant in the hospital had applied hot water bags or any other instrumentality to produce the injuries upon the plaintiff.

In the case last cited, the court referred to the application of this rule in the following words:

"The doctrine res ipsa loquitur is properly applied to the facts of this case. The patient was unconscious. Under its contract with her the defendant corporation owed her a duty of protection which was violated by the use of an instrumentality

which produced the painful results which were made manifest when she came out from the influence of the anesthetic. Proof of the accident carried with it the presumption of negligence. And this is the rule whether the liability be ascribed to the carelessness of experienced nurses or to defendant's negligence in selecting nurses who were not competent."

NOTES OF IMPORTANT DECISIONS

ZONING ORDINANCE HELD VALID.—The case of City of Aurora v. Burns, 149 N. E. 784, decided by the Supreme Court of Illinois, upholds the validity of a zoning ordinance of the City of Aurora enacted pursuant to statutory authority. Among other things this case holds that the fact that property to be used more profitably for a use not conforming to the provisions of the ordinance is not of any consequence in determining the validity of the ordinance. Also that to exempt buildings, already devoted to a particular use, from prohibition against such use of buildings thereafter erected, is not an unlawful discrimination invalidating the ordinance. It holds that a zoning ordinance, segregating factories and places of business from the residence district under a community-wide zone plan, is not invalid as fostering or creating a monopoly. In respect to this question generally the Court said:

"Zoning is regulation by districts and not by individual pieces of property. The classification, as a whole, must be fair, but an absolute identity of treatment of particular parcels of land is not required. The power must be reasonably exercised. The question is not whether we approve the ordinance under review, but whether we can pronounce it an unreasonable exercise of power, having no rational relation to the public health, morals, safety or general welfare. The ordinance is the result of more than seven months of study and planning, with the aid of expert advice. All of the territory of the city is included within the several districts created by the ordinance. Appellants are treated exactly as any other property owner within the same district. Nothing in the ordinance indicates that it operates oppressively or inequitably. Should any discrimination develop it can be removed by the administrative action of the board of appeals, for which provision is made both by the Enabling Act and the ordinance. Such action is subject to review by the courts."

PHOSPHORUS POISONING AS "ACCIDENTAL INJURY," WITHIN COMPENSATION ACT.—The Court of Appeals of Maryland, in Victory Sparkler & Specialty Co. v. Francks, 128 Atl. 635, holds that the disease of phosphorus poisoning contracted by an employee of a fireworks factory, is not an occupational disease, but an injury in causal connection with the employment, within the meaning of the Workmen's Compensation Act of that State, which defines injury to mean only accidental injuries and diseases naturally resulting therefrom. A part of the Court's opinion follows:

"It will be observed that the statutory definition of a compensable injury under the Maryland Act is not that it is an 'accident' or that it is an 'injury by accident,' but that it must be 'accidental injuries.' The difference is important, as it marks the divergence between the thing or the event (i. e. accident) and a quality or a condition (i. e. accidental) of that thing or event. As the substantive carries the idea of something happening unexpectedly at a time and place, the term 'accident' or 'injury by accident' has been consistently construed by the courts to embrace two different notions. The first is that of unexpectedness, and the second that of an injury sustained on some definite occasion, whose date can be fixed with reasonable certainty. The adjective 'accidental' is not a technical term but a common one, whose popular usage would not necessarily mean that the words 'accidental injuries' indicated the existence of an accident, but rather the idea that the injury was either unintended or unexpected. In the term 'accidental injuries,' the substantive 'injuries' expresses the notion of the thing or event, i. e., the wrong or damage done to the person; while 'accidental' qualifies and describes the noun by ascribing to 'injuries' a quality or condition of happening or coming by chance or without design, taking place unexpectedly or unintentionally."

RIGHT TO DISPOSSESS TENANT OCCUPYING EMPLOYER'S HOUSE ON TERMINATION OF EMPLOYMENT.—The Supreme Court of Appeals of Virginia, in Virginia Iron, Coal & Coke Co. v. Dickerson, 129 S. E. 228, holds that a mining company has the right to dispossess employee occupying house furnished by company as necessary or convenient for purpose of employment on termination of employment and notice to vacate, independent of contract by which it served such right.

Relative hereto, the Court said:

"Not only do the facts show, but the contract clearly establishes, the fact that the plaintiff occupied the company's premises solely by virtue of the fact that he was an employee, and that his right to occupy the premises was deter-

mined wholly by the contract, which, while its terms may appear harsh, and its strict enforcement may work a hardship, he, sui juris and compos mentis, had signed it and was bound by its terms. Thus, he knew that, when his employment by the company ceased, by the terms of his contract his right to occupy the company's premises ceased. He knew that if he received five days' notice to vacate, his right to occupy the premises ceased, and it was his duty to vacate whether he had paid the rent provided for or whether he was willing and ready to pay it or not. He knew that, under the terms of his contract if he did not vacate upon the happening of either of these events, the company had a right to remove his effects from their premises forthwith, and to use such force as might be necessary for that purpose. The right of the company to dispossess him was not dependent upon whether it was convenient to the plaintiff or whether he had secured another house to move his effects into. He knew he was not an employee of the company, and he knew he had received notice under the contract to vacate. Even under circumstances such as obtain here, independent of contract, the employer has a right to dispossess the servant when the relationship of master and servant ceases."

In 16 R. C. L. title "Landlord and Tenant," § 54, p. 579, the rule is thus stated:

"Frequently in connection with one's employment he is given the right to occupy a dwelling house or apartment of his employer. In such a case if the occupancy is directly incident to the service, or is required for the necessary or better performance of the service, he is generally considered merely as a servant and not as a tenant, and the possession is that of the master; and to render the occupation that of a servant it is not necessary that the occupation of the house be a necessary or essential incident to the service to be performed; it is enough if such occupation is convenient for the purpose of the service and was obtained by reason of the contract of hiring."

In 24 Cyc. title "Landlord and Tenant," p. 1394, it is said:

"The rule, supported apparently by the weight of authority, is, that where the landlord has become entitled to immediate possession of the premises through expiration of the term, or otherwise, he may take such possession by force without incurring civil liability, in case no more force than is reasonably necessary is employed, and although he may be subject to punishment criminally, under statute relating to forcible entry and detainer."

Again, on page 1396:

"Where the landlord is entitled to the possession, he may enter the premises by force in the absence of the tenant, without incurring civil liability, in case no unnecessary injury is done.

"Where the landlord has effected an entry, although in the absence of the tenant, he may remove the goods of the tenant from the premises, provided he occasion them no unnecessary damage in so doing."

See, also, Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Hyatt v. Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; 16 R. C. L. title "Landlord and Tenant," § 700, p. 1177.

This is the law, or at least it is the weight of authority, where the relationship of master and servant exists, and the occupancy of the master's premises is because of this relationship. In the instant case, however, the rights of the parties are determined by contract which expressly gave the company the right to take possession when the employment ceased, and to evict the plaintiff.

"Where a lease provides that if the tenant holds over after the expiration of the term, the landlord may enter and take possession of the premises, using all necessary force to obtain the actual possession thereof, which should not be regarded as a trespass, nor sued for as such, nor in any wise be considered unlawful, the landlord may forcibly expel the tenant upon the termination of the tenancy, using no more force than is necessary, and will not be liable therefor, such a condition in the lease being valid." 16 R. C. L. title "Landlord and Tenant," § 701, p. 1179.

In Jabbour Bros. v. Hartsook, 131 Va. 170, 108 S. E. 684, this Court said:

"The seventh clause of the lease provides that if the rent shall 'at any time be in arrears and unpaid,' the lessor may terminate the lease at the expiration of 10 days from the time of giving the notice, such as was given as aforesaid. Hence, neither the common-law rules on the subject of what a landlord must do to terminate a lease because of nonpayment of rent, nor the statute in Virginia on the subject, have any application. The subject is governed and controlled in the case in judgment by the express contract of the parties and by the action of the lessor in accordance therewith."

RAILROAD YARDMASTER HELD NOT WITHIN HOURS OF SERVICE ACT.—The United States Supreme Court, in the case of Atchison, T. & S. F. R. Co. v. United States, 46 Sup. Ct. 109, holds that a yardmaster, whose duties extended to breaking up and making up trains, prompt movement of cars, and general charge of the yard, and who communicated with the tower, where movements were directed

by means of telephone, did not come under the provisions of the Hours of Service Act, limiting to nine hours the service of an employee who, by use of the telephone, receives orders pertaining to or affecting train movements.

In respect to this question, the Court said:

"Two yardmasters were kept on duty for twelve hours each, by the railroad company in its Corwith Yard, Chicago, and the question is whether upon the statement of their duties they fell within the Act, bearing in mind that 'the purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task.' Chicago & Alton R. R. Co. v. United States, 247 U. S. 197, 199, 200, 38 S. Ct. 442, 443 (62 L. Ed. 1066).

"The Corwith Yard lies to the South of the defendant's road, which runs East and West. Between the yard and the road, and parallel to the latter, runs the road of the Chicago & Alton Railroad, which must be crossed by cars coming from or going to the defendant's tracks to or from the yard. These crossings are controlled from a tower on the Chicago & Alton's line. When cars of either road seek to enter the yard the tower man generally telephones to the yardmaster to find out whether he is in condition to receive them, and when cars are to go out the yardmaster telephones to the tower man to know if they can pass; but the yardmaster has no authority over the tower man and his telephone either way is not conclusive of the tower man's action. Conversely the tower man has no authority over him.

"The yardmaster's duties extend to the breaking up and making up of trains, the prompt movement of cars, and general charge of the yard. The telephoning, although a part of them, was an incidental part only, and a small one. Twenty-four calls a day seems a too liberal estimate. The messages were not orders, although they generally would govern the decision of the tower man. His decision was not obedience to any authority of or represented by the yardmaster. The movements that the messages affected were not of the kind that require the greatest solicitude, even when they were train movements, which, of course, was not always the case. The office hardly could be described as 'continuously operated,' when the yardmaster was not in it much more than half the time, but was about the yard attending to other things. Taking all the facts into account we are of opinion that the employment of the yardmaster for more than nine hours was not within the evil at which the statute was aimed and that the ruling to the contrary was wrong."

PUTS AND CALLS AND THE BOARD OF TRADE OF CHICAGO

In Illinois it was unlawful to deal in options (puts and calls) from 1874 until 1913, but the Illinois Supreme Court said that it was only contracts for options which were in the nature of gambling transactions that were within the meaning of Sec. 130 Ill. Crim. Code, 282 Ill. 192, 196.

In "The Future Trading Act," approved August 24, 1921, Congress placed a tax of twenty cents per bushel on every privilege or option and thereby taxed transactions known to the trade as "privileges," "bids," "offers," "puts" and "calls," "indemnities or "ups" and "downs" all meaning the same. This tax stopped all trading in puts and calls because of the size of the tax. The United States Supreme Court has recently held that the imposition of this tax was a penalty and in no proper sense a tax, so that Section of the Act was held to be unconstitutional.[1]

Dealing in puts and calls was neither void nor voidable at the Common Law.[2]

Puts and calls called bids and offers are now dealt in on the Board of Trade in Chicago and when so dealt in as indemnities there cannot be any question about their legality. The Supreme Court has held that a contract by which, as merely incidental to a legitimate business transaction, an option is given to do a certain thing is not within the meaning of the Statute against gambling contracts.[3]

If a man has bought ten thousand bushels of wheat at $1.75 per bushel for delivery in May he has a right to protect himself against more of a loss than three cents per bushel, or $300.00, tomorrow by buying ten bids at $1.72 per bushel good until the close of the market tomorrow at 1:15 p. m. He pays $10.00 and a small commission for that protection when he buys the ten bids. If the market price

(1) Trusler v. Crooks, 46 Sup. Ct. Rep. 165.
(2) Schneider v. Turner, 130 Ill. 28.
(3) Bates v. Woods, 225 Ill. 126.

does not go down to $1.72 tomorrow he has lost the $10.00 but he has had the protection. Just as a man has the protection when he insures his house against loss by fire. If he had sold the wheat short at $1.75 he could have bought offers at $1.78. It is just as lawful to sell short as it is to buy long. A "bid" is a "put" and an "offer" is a "call." It means that you can put the wheat to the man who sold you the bid or you can call for the wheat from the man who sold you the offer. The Supreme Court defined puts and calls in 113 Ill. 228. There are men who deal in puts and calls as a business and they have a perfect right to do so if they intend to buy or sell the wheat if it reaches the bid or offer price the next day. One thing is certain and that is that a member of the Board must make good on his contracts or be expelled and his membership will be sold and the proceeds of the same will be applied to the settlement of his contracts on the Board. A man can either buy or sell bids or he can buy or sell offers. He is buying or selling "privileges" the right to exercise a privilege tomorrow. Just the same as the right to buy a carload of coal tomorrow at any time before 1:15 p. m. at a stated price. He can take it or not as he pleases if he has the option, which is only another name for a privilege.

The return of dealings in bids and offers on the Board of Trade has had a strong tendency to steady the market and keep the price within the bid and offer price. Buying and selling grain for future delivery is one thing and buying and selling bids and offers is quite another. If a man sells ten offers and gets $10.00 for them he takes the risk of having to buy ten thousand bushels of wheat if it reaches the offer price the next day. Bids and offers are also bought and sold that are good for a week, but the price of them is usually about ten cents per bushel below or above the market price.

One of the best considered legal opinions and decisions in Illinois on the subject of "Options" and "Futures" is the case of Nash-Wright Co. v. Wright.[4] There is also a leading article on Speculation in Grain for Future Delivery in 98, Central Law Journal, 365-373.

The line between legal and illegal grain future transactions is stated in the leading case of Whitesides v. Hunt.[5] A leading English case as to the intention of the parties governing and determining the character of the contract is that of Grizewood v. Blaine.[6]

The Illinois Supreme Court has not yet been called upon to pass on Section 130 Ill. Crim. Code as amended in 1913 on Options.

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(4) 156 Ill. App. 243, by Mr. Justice Mack.
(5) 97 Ind. 191.
(6) 11 C. B. 526, cited in 4 Ill. App. 594 (Option Contracts).

ARMY COURTS-MARTIAL

This title was suggested by the recent trial of Col. William A. Mitchell of the Aviation Corps in the regular army. That he would be found guilty was self evident, for he had violated the Articles of War. As to his punishment, that involved discretion, and suspension from service for five years was, perhaps, not excessive from a military viewpoint. The President approved the sentence except to grant him half pay and allowances. This brings up legal questions about courts-martial and reminiscences recalling celebrated events and distinguished military and naval commanders.

Our law recognizes three classes of courts-martial—a general court-martial consisting of not less than 5 nor more than 13 officers; a special court-martial of 3 to 5, and a summary court-martial of one officer. The latter is much like a city police court where minor offenses are considered, and only privates are tried and sentenced.[1]

(1) See Barnes Fed. Code. p. 443.

While the Mitchell court-martial produced much newspaper notoriety and was probably played up before the public to a high pitch, because of interests which would be benefited if Col. Mitchell's air service plans were adopted, yet it nowhere evoked the interest in the Hazen trial before a General Court-Martial which convened in March, 1885, at Washington City.

In 1906 I was sightseeing in Washington, D. C., and went to the National Cemetery at Arlington, formerly the home of Gen. Robert E. Lee. I stepped into a "rubber neck" wagon to see the grounds. The "spieler" began by pointing out the principal attractions; among them he called attention to a black marble cube standing on one of its four points. "This," he said, "is a monument to Gen. Hazen, the first husband of Mrs. Admiral George Dewey." "Verily" I soliloquized, "this is an illustration that 'some men achieve greatness, others have greatness thrust upon them.'" For Gen. Hazen apparently attained posthumous fame, because his widow married Admiral Dewey.

Although Brig. Gen. William B. Hazen was an officer of distinction and served his country well and faithfully. He was graduated from the U. S. Military Academy at West Point in 1855; served in Indian wars in California and Oregon, being severely wounded. In 1861 he became professor of military tactics at West Point, and participated in many engagements during the Civil War, exhibiting great skill as a commander. He was breveted major-general; was in France during the Franco-Prussian War, and was U. S. military attache during the Russo-Turkish war in 1877. In 1880 he was appointed chief signal officer, made important innovations in the service, such as "frost warnings" and established the present standard-time meridians, etc.

The trouble arose through the Lady Franklin Bay Expedition commanded by Lieut. (the late General) W. A. Greeley of Weather Bureau fame. This venture became a terrible disaster, where out of twenty-five only seven survived, when rescued in 1884 under a relief expedition under Commander (late Admiral) W. S. Schley of Spanish-American renown.

Gen. Hazen, as chief signal officer, had supervision of the relief expedition. Robert T. Lincoln was Secretary of War. On February 17, 1885, Gen. Hazen addressed a letter to the Secretary of War in answer to statements in the annual report for 1884 of the Secretary, wherein were severe strictures upon Gen. Hazen in his relation to the ill-fated Arctic Expedition. Then Secretary Lincoln preferred charges against Gen. Hazen of "Conduct to the prejudice of good order and military discipline in violation of the 62nd Article of War," which is yet in force and reads thus: "Any officer who uses contemptuous or disrespectful words against the President, Vice-President, the Congress of the United States, the Secretary of War * * * shall be dismissed from the service or suffer such other punishment as a court-martial may direct." The charge contained three specifications, of which the first was of real importance, on which alone a conviction was had, to-wit: that Brig. Gen. William B. Hazen "did in his official annual report as Chief Signal Officer bearing date October 15, 1884, criticise the official action of the Secretary of War and impugn the propriety thereof, by saying as follows: Concerning the sending of a relief expedition, etc."

It is the law that no officer shall be tried by officers inferior to the accused in rank. Perhaps no more distinguished military court ever met in this country. There were the following Major-Generals: Hancock, of Gettysburg fame and Democratic candidate for President in 1880, who presided. He was the beau ideal of the soldier—tall and erect with a genial personality, one who inspired his men with the highest ambition on the battlefield. I saw him at West Point in 1881 when he came with the French fleet which anchored

in the Hudson River to celebrate the centennial of the battle of Yorktown in which Comte de Grasse and his warships had taken a conspicuous part; Schofield, who became commanding general of the army; Brigadier-Generals: Howard, who was superintendent of West Point; Terry, who captured Fort Fisher; Augur, having a fine war record; Rochester, paymaster-general; Hollabird, quarter-master-general; Murray, surgeon-general; Newton, chief of engineers, who blew up the Hell Gate rock; Andrews, Merritt and Black. Capt. Clous was Judge Advocate of the Court. Brig.-Gen. MacFeeley was challenged for cause and excused.

Judge T. J. Mackey represented Gen. Hazen; the trial lasted ten days and the finding of the court was that "Brig.-Gen. William B. Hazen, Chief Signal Officer of the U. S. Army be censured by the reviewing authority." Grover Cleveland was President, and he approved these findings, with these remarks of "censure"—"Subordination is necessarily the primal duty of a soldier, whatever his grade may be. In losing sight of this principle the accused has brought upon himself the condemnation of his brother officers, and seriously impaired his own honorable record. Gen. Hazen will be released from arrest and assume the duties of his office."

Civilians may not approve of the Mitchell nor the Hazen court-martial decision, but military discipline must be maintained, and they could not have done otherwise. If any officer desires to criticise the service, or wishes to show the error of the government in adopting or rejecting certain methods or means of warfare, he can do so honorably only by resigning his commission. As a private citizen he may proclaim his views and urge them for acceptance and is not subject to trial by a military court.

Another celebrated court-martial involved the conduct of Gen. Fitz-John Porter, nephew of Admiral David Porter, who co-operated with Grant at Vicksburg. He graduated from West Point in 1845, and at Chapultepec and Molino del Rey his services won him the rank of major. He was commissioned a brigadier-general, and at the disastrous second battle of Bull Run he was accused of inaction, court-martialed and dismissed. For about twenty years he demanded that justice be done him. It appears that Gen. McDowell had sent orders to Gen. Porter at 9 p. m. on August 27, 1862, to have his corps of 35,000 men at Bristoe Station at sunrise next morning. Gen. Porter claimed "his men were too tired, the night was too dark and there was a wagon train on the road." The distance was only nine miles, but he arrived six hours late. Maj-Gen. Pope states that enemies of Porter "likened him to Benedict Arnold, and his friends favorably compared him with George Washington. * * * If Gen. Porter had attacked Longstreet's right with one-third of his men, the effect would have been conclusive. Porter's case is the first I have ever known or find recorded in military history, in which the theory has been seriously put forth that the hero of a battle is the one who keeps out of it." See Battles and Leaders of the Civil War, Vol. 2, p. 484.

Of course Porter was found guilty of disobeying orders and summarily dismissed. It always aggravated me beyond endurance when I read of Porter's conduct. The only explanation is that Porter was not heart and soul with the North. Through the interposition of Gen. Grant, Porter was re-instated in 1878 with the rank of colonel, placed on the retired list without pay or past allowances. Gen. Grant was most generous toward anyone in trouble, for he had faced a court-martial as a captain while at Vancouver, Wash., and was permitted to resign. The late George H. Williams, the ablest lawyer of Portland, Oregon, defended him. When Grant became President he appointed Williams his Attorney-General, and then to succeed Salmon P. Chase, Williams'

name was placed before the Senate for Chief Justice but rejected. Had Williams been confirmed and served to the time of his death he would have been a member of the U. S. Supreme Court longer than any other judge of that court.

During the Civil War very few cases came before a court-martial. About 260,000 were arrested under arbitrary orders of Stanton, then Secretary of War. He was no respecter of persons. Gen. Kilpatrick was put in prison for seizing livestock and converting forage to his own use. Gen. Custer, killed by the Indians at Little Big Horn, was also jailed on similar charges before he could explain. For these acts Stanton was denounced, but in reality there are no "arbitrary arrests" while the army is in control.[2]

When President Lincoln was assassinated eight persons were arrested for conspiracy to cause his death. Among them was Mrs. Mary E. Surratt at whose house the conspirators had met. A military commission of nine officers tried them. Joseph Holt, who was Buchanan's Secretary of War, was Judge-Advocate-General. The trial began May 10, 1865, and ended June 30th. Mrs. Surratt and three men were sentenced to be hanged and the other four to be imprisoned.

President Johnson refused to see any one about Mrs. Surratt, but Mrs. Stephen A. Douglass saw him to no avail. The execution was set for July 7, 1865, but the Supreme Court of the District of Columbia issued a writ of habeas corpus for Mrs. Surratt, directing Gen. Hancock to produce her in court. He handed the writ to Stanton who requested Attorney-General Speed to draw a proclamation suspending the writ; the President so ordered and the conspirators were hanged at once.

On March 1, 1869, three days before President Johnson left the presidency, he pardoned three of the conspirators then living. Lincoln was in doubt whether to appoint Holt or Stanton for his Secretary of War, but the latter was by far the abler man. The great and good Lincoln required the fierce, fearless and unrelenting Secretary to carry through the war. Stanton wanted every offender shot. Lincoln would ask: "Stanton, if you show me that shooting will do him any good, let us shoot him."

There was the case of Brig.-Gen. Chas. P. Stone. He was charged with contributing to the defeat at Ball's Bluff, a serious set-back to the Union cause. By order of Stanton he was imprisoned without any charges preferred against him. Resigning his commission he went to Egypt where he served the Khedive as chief of staff and general aid-de-camp with the rank of Lieut. General under the title of "Ferick Pasha."

I believe that Gen. Stone was not guilty of cowardice nor treason, but some one had to be the "goat" and he suffered accordingly.

We now come to a celebrated court-martial which occurred during the World War. When the Germans invaded Belgium an English lady had charge of a hospital. She was continued in that position by the invaders until it was discovered that foreigners could not be trusted in affairs affecting their native land, for she had obtained and sent valuable information to the British officers. This led to her trial before a German military commission lasting four days. She stood mute, offering no defense, and the sentence was death. It was an absurdity in days of war wasting so much time on a trial; if she had been sent to reside in a German castle during the war and then released, her name would have scarcely become known. The stupidity of military commanders during psychological moments, or when tact would be of supreme importance, is amply confirmed by history. That she had technically violated the laws of war was well established; yet, the sympathy of the whole world was aroused in her support

(2) See Manchester's Stanton, p. 133.

at the trial and there was general indignation when she was ruthlessly shot.

In the Selkirk Range in Western Canada stands a majestic peak over two miles high; this mountain has been renamed Mount Edith Cavell.

In 1921 I was in London at Trafalgar Square where stands the Nelson column guarded by the colossal lions of Landseer. On one side of this celebrated square is the historic church, St. Martin's in the Fields. In front of it is a street that is crowded to the limit, yet there in the middle stands the figure of a woman chiselled in the purest white marble on which this simple yet elegant inscription appears: "Edith Cavell, At Dawn—At Brussels, October 1, 1914. For King and Country!"

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ELEVATORS—PERSONAL INJURY

SWITZER v. DETROIT INV. Co.

206 N. W. 407

(Supreme Court of Wisconsin, December 8, 1925. Dissenting Opinion, December 21, 1925.)

Person who, on finding elevator door partially open, opened door and stepped into shaft, held to have failed to exercise ordinary care for his own safety.

Defendant owned an 8-story building on the corner of East Water and Detroit streets in Milwaukee, equipped with a passenger elevator with a floor space of about 8 by 10 feet. Shortly after noon January 11, 1922, plaintiff, a man over 50, who had visited the building a number of times before to transact business with a tenant on one of the upper floors, entered it for the same purpose; the front door of the building and the door of the elevator facing the west and 12 to 15 feet apart. Plaintiff recognized and greeted the regular elevator operator, who was standing at the front door, and who remained there until after the accident. The plaintiff testifies that he found the elevator door unlatched and opened toward the south some 3 or 4 inches. With the back of his right hand and the weight of his body he shoved it wide open and stepped forward with his left foot and part of his body. Then realizing that the elevator was not there he grasped the edge of the open elevator door with his right hand and hung with his body substantially in the shaft except his right leg and foot, the latter remaining on the floor of the hall, his head being some distance forward into the shaft and about 18 feet above the basement floor. While in this position he screamed several times, and turning his head upward, noticed the elevator coming down and to a stop a little below the level of the second floor, which was about 16 feet above the first. The elevator then proceeded downward, and one part of it, probably the plunger or projection below the center of the elevator, striking the top of his head, the platform his right hand, thereby forcing him to let go of his hold and fall to the basement. As a result he received severe injuries.

He received compensation from his employer, and thereafter, the employer and the insurance carrier refusing to institute an action, he brought this suit.

The elevator at the time of the accident was in charge of the relief operator, who was called as an adverse witness, and testified that he was slowing down and brought the elevator to a full stop when the floor of the same was about 1½ or 2 feet below the level of the second floor and at the time he heard a cry. He then looked down from the front of the elevator and saw the plaintiff with part of his body above the first floor. He testified that he was scared, and does not know whether the plaintiff's hands were holding onto anything, but does not think so, and that when he came to and looked around he saw plaintiff going down the shaft. He was not asked as to what he did after that.

The complaint alleged, among other things, as grounds for the right of recovery, the leaving of the door of the elevator open; the employing of an incompetent and inefficient operator; a failure to cause the elevator to be operated with the highest degree of skill and care reasonably to be expected from human diligence and foresight, in view of the mode and character of the conveyance; negligence in permitting said elevator to descend under such conditions to the first floor. There was no charge of gross negligence.

Def ndant's motion for nonsuit was granted, and, from the judgment dismissing the action, plaintiff has appealed.

Walter F. Mayer and James E. Coleman, both of Milwaukee, for appellant.

Glicksman, Gold & Corrigan, of Milwaukee, for respondent.

ESCHWEILER, J. (after stating the facts as above). While those responsible for the operation of passenger elevators in buildings such as this are classed as common carriers, so far

as the extraordinary degree of care required of them by the law is concerned (Ferguson v. Truax, 136 Wis. 637, 118 N. W. 251), yet here plainly the plaintiff could not be considered a passenger in any sense of that term, and therefore the allegations of the complaint in that regard are not applicable to the facts here shown. In his complaint, plaintiff did not assert that there was, on the part of the operator, that which is designated in this jurisdiction as gross negligence.

Plaintiff here admitted that he did not look to see if the elevator was in proper position, nor at the dial, if any such there were above the door, to learn the possibly indicated position of the elevator in the shaft, and he made no claim of insufficiency of light. There can therefore be no doubt but that plaintiff, in further opening the door and projecting himself forward into the shaft, failed to exercise ordinary care for his own safety. He placed himself in danger, not only of falling down the shaft, but also from movement of the elevator in the shaft. The unlatched elevator door, as plaintiff approached, open as it was not to exceed 4 inches, was a warning signal rather than an invitation to enter. Bremer v. Pleiss, 121 Wis. 61, 98 N. W. 945.

Plaintiff contends, however, that the real proximate cause of his injuries was the alleged negligence of the elevator operator in permitting the elevator to descend from the point at which it had stopped just below the second floor and after the operator knew of plaintiff's peril, and that any prior negligence on his part in placing himself in such a position is immaterial, because it ought not be considered a proximate cause contributing to his injuries.

Situations such as are here presented have been often met and discussed under what is frequently denominated as the doctrine of "the last clear chance," "supervening negligence," or "discovered peril." The term "comparative negligence" is also sometimes used, but it should perhaps more accurately be confined to situations where the law permits of the jury's determination of the respective proportions where each party is found negligent as has been authorized by statute in certain actions against railroads as presented in such cases as Tidmarsh v. C. M. & St. P. R., 149 Wis. 599, 136 N. W. 337. Many courts have upheld the right of a plaintiff to recover, there being but ordinary negligence, as distinguished from gross negligence, by defendant, intervening the injury and the negligence of plaintiff in placing himself where the accident occurred—some such as Dyer v. Cumberland County P. & L. Co., 120 Me. 411, 115 A. 194, stating the rule to be that the prior negligence of plaintiff creates but a condition, and is not to be regarded as the proximate cause; others like Chunn v. City & Sub. Ry., 207 U. S. 302, 309, 28 S. Ct. 63, 52 L. Ed. 219, holding that such subsequent failure to use reasonable care may be found to be the sole cause of the injury. A list of the holdings may be found in 29 Cyc. 530, and in note 28 A. L. R. p. 283.

This court, however, after repeated and full consideration of the question and of the decisions on both sides, has refused to recognize such a doctrine or rule of law as here contended for by plaintiff, and has suggested, in Tesch v. Milwaukee E. R. & L. Co., 108 Wis. 593, 604, 84 N. W. 823, 53 L. R. A. 618, that for any change in such so declared public policy resort should be had to legislative action.

In Lockwood v. Belle City St. Ry. Co., 92 Wis. 97, 65 N. W. 866, there was a full discussion of the subject, and a holding that there could be no recovery in the absence of a showing of gross negligence on a motorman's part after he discovered plaintiff's perilous position caused by plaintiff's negligence, and that a finding of a lack of ordinary care by the motorman was insufficient to support a recovery. This case declares (page 111) that the doctrine of the three degrees of negligence—slight, ordinary and gross—is here firmly established, and this doctrine is reiterated in Astin v. C., M. & St. P., 143 Wis. 477, 483, 128 N. W. 265, 31 L. R. A. (N. S.) 158, and again in Bentson, Adm'r, v. Brown, 186 Wis. 629, 633, 203 N. W. 380, 38 A. L. R. 1417, and note. The same division of degrees is also recognized in Altman v. Aronson, 231 Mass. 588, 593, 121 N. E. 505, 4 A. L. R. 1185.

The subject was again considered, and the same result reached in Bolin v. C., St. P., M. & O. R. Co., 108 Wis., 333, 346, 84 N. W. 446, 81 Am. St. Rep. 911, citing with approval what was said in White v. C. & N. W. Ry. Co., 102 Wis. 489, 496, 78 N. W. 585, that, where defendant's negligence is short of that defined as gross, contributory negligence by plaintiff defeats recovery. Again in Tesch v. Milwaukee E. R. & L. Co., 108 Wis. 593, 601, 84 N. W. 823, 53 L. R. A. 618. In Watermolen v. Fox River E. R. Co., 110 Wis. 153, 158, 85 N. W. 663, the court saying that a finding of contributory negligence by plaintiff required a judgment for defendant, even though it was found that a motorman failed to exercise ordinary care after discovering the danger of a collision, and this is cited with approval in Owen v. Portage T. L. Co., 126 Wis. 412, 105 N. W. 924. See, also, Lotharius v. Milwaukee E. R. & L. Co., 157 Wis. 184, 146 N. W. 1122.

Several cases in this court are cited by appellant as supporting the position he takes here but such cases are expressly or by implication overruled, and no longer correct expositions of the law such as the following: In Woodard v. W. S. St. Ry. Co., 71 Wis. 625, 38 N. W. 347, without discussion or consideration of authorities, it was held that a plaintiff might recover for injuries caused by being dragged alongside of a street car which he had carelessly tried to board and was caught in the door handle by a ring on his finger, if the driver could have avoided the injury by the exercise of ordinary or reasonable care after he was notified of plaintiff's peril. This decision does not seem to be cited in any subsequent case. The same doctrine and in the same manner was declared in Vallin v. M. & N. R. Co., 82 Wis. 1, 16, 51 N. W. 1084, 33 Am. St. Rep. 17, that supervening negligence need not be gross negligence in order to authorize recovery. This case is quoted in the Lockwood and Bolin Cases, supra, and declared out of harmony with other cases and to be incorrect. In Schmolze v. Chicago, M. & St. P. Ry. Co., 83 Wis. 659, 53 N. W. 743, 54 N. W. 106, the rule stated in the Vallin Case, supra, was apparently recognized as the law but held not applicable under the facts here.

The trial court, therefore, under the law here, was required to grant the motion for nonsuit as he did.

Judgment affirmed.

CROWNHART, J. (dissenting). I dissent from the opinion of the court in this case. The rule there laid down, I think, extends the doctrine of contributory negligence as a defense beyond that of any case heretofore decided in this state, and it is contrary to the almost universal decisions of other jurisdictions. It is contrary to the decisions of this court prior to 1900. As early as 1859, Chief Justice Dixon, speaking for the court, adopted the rule of Vermont, as follows:

"* * * When the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury." Stucke v. Milwaukee & Mississippi R. Co., 9 Wis. 215.

The same principle was stated in Woodward v. West Side Street R. Co., 71 Wis. 625, 633, 38 N. W. 347, 350, in the following language:

"Even if the plaintiff was guilty of negligence in attempting to get on the car while it was in motion, yet if the jury find from the evidence in the case that the driver was notified that the plaintiff had fallen and was being dragged at the tail of the car, and the jury also find that the driver could have avoided the injury by the exercise of reasonable care, then the defendant is liable."

In 1892, the rule was stated by Mr. Justice Pinney, speaking for the full court, in a very carefully considered opinion, to-wit:

"The negligence of the deceased will not enable the company to escape liability, if the act which caused the injury was done by the defendant after it discovered his negligence, and if the defendant could have avoided the injury in the exercise of reasonable care. Morris v. C., B. & Q. R. Co., 45 Iowa, 32, and cases there cited. This rule is well sustained by numerous authorities; and such supervening negligence, as the deceased was not a trespasser, need not be gross negligence in order to authorize a recovery. In such a case, it is enough that the defendant, by the exercise of reasonable care and prudence, might have avoided the consequences of the plaintiff's negligence. Inland & S. C. Co. v. Tolson, 139 U. S. 551, 558 [11 S. Ct. 653, 35 L. Ed. 270]; Radley v. L. & N. W. R. Co., L. R. 1 App. Cas. 754-759; Scott v. D. & W. R. Co., 11 Ir. C. L. 377; Austin v. N. J. Steamboat Co., 43 N. Y. 82 [3 Am. Rep. 663]." Valin v. The Milwaukee & Northern R. Co., 82 Wis. 1, 16, 51 N. W. 1084, 1089, 33 Am. St. Rep. 17.

In the Valin Case it is also said, at page 15 (51 N. W. 1089):

"* * * Those in charge of locomotives and passing trains must not neglect to act with the care, caution, and tenderness of human safety and life plainly required by the common dictates of humanity."

The same rule should apply to a passenger elevator. The general rule as stated in other jurisdictions is given in 20 Ruling Case Law, § 114, p. 138, as follows:

"The proposition has been formulated in a great many opinions that the negligence of a plaintiff will not bar him of recovery, if it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. This proposition has been referred to sometimes as the doctrine of 'last clear chance,' sometimes as the humanitarian doctrine, and occasionally as the rule of Davies v. Mann. As it usually is expressed, a person who has the last clear chance or opportunity of avoiding an accident, notwithstanding the negligence of

his opponent, is considered in law solely responsible for such accident. The Supreme Court of the United States thus lays down the doctrine of contributory negligence as modified by that of the last clear chance: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification which has grown up in recent years: That the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.' The doctrine really means, however, that even though a person's own acts may have placed him in a position of peril, yet if another acts or omits to act with knowledge of the peril, and an injury results, the injured person is entitled to recover."

To the same effect, see 29 Cyc. 529, where it is said:

"The negligence of the person injured will not defeat recovery if the injury is disconnected from his act by an independent cause, there being no legal contribution to the injury. Where the negligence of defendant is the proximate cause, and that of the person injured is the remote cause, an action may be maintained, although plaintiff was not entirely free from fault. Where the act or omission of the person injured amounts merely to an antecedent occasion or condition of the injury remote in the sense of causation, it is not contributory negligence. So if the negligence of the person injured did not occur at the time of the injury, and preceded it in point of time, and was independent of that of defendant, a recovery is not barred thereby. But the negligence of a person injured is not remote, although its inception was prior to that of defendant, where it continued up to the time of the accident."

In Lockwood v. Belle City Street R. Co., 92 Wis. 97, 109 65 N. W. 866, 868, Chief Justice Cassoday, writing the opinion, said:

"But it is vigorously urged that the case at bar comes squarely within the ruling of this court in Valin v. M. & N. R. Co., 82 Wis. 1 [51 N. W. 1084, 33 Am. St. Rep. 17]. The two cases are, however, broadly distinguishable."

And he then proceeds to distinguish between the cases. But in Bolin v. C., St. P., M. & O. R. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911, Mr. Justice Marshall, writing the opinion, said:

"Valin v. M. & N. R. Co., 82 Wis. 1151 N. W. 1084, 33 Am. St. Rep. 17], is recognized as out of harmony with previous decisions of this court."

However, that statement was wholly unnecessary to the decision of that case. Since then the Valin Case has not been followed. Since the decision in the Valin Case, the considerations of the law respecting contributory negligence have been with reference to the doctrine of comparative negligence, gross negligence, slight negligence, and ordinary negligence, with the result that the law is left in much confusion.

In the instant case the proximate cause of the injury was the starting of the elevator from its place of safety, down upon the plaintiff, after the operator knew of plaintiff's danger from such act. Now, from this starting point of defendant's negligence there was no negligence whatever on the part of the plaintiff contributing to his injury. He was doing the best he could to escape from his dangerous position. I concede that his negligence in getting into the shaft was a bar to recovery on account of the negligence of the defendant in leaving the door open. But it is a somewhat horrible doctrine that a person, once guilty of negligence, becomes an outlaw.

Let us suppose a case fitting that theory with the law: By reason of contributory negligence, joined with the negligence of another, a person is run down by an auto in a public street and badly injured, so that he cannot arise. May the driver of the auto, seeing his helpless condition, negligently run over him again without liability? Or may a second auto come along and carelessly run over him without liability? The English court answered these questions, in a case where an ass was fettered in the street through the negligence of the owner, and the driver of a wagon, coming along and seeing the animal there, carelessly ran him down, and the owner was allowed to recover. The trial judge told the jury that the mere fact of negligence on the part of plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury, and the Appellate Court said:

"All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." Davies v. Mann, 10 Meeson & Welsby's Reports, 546, 549.

This is a leading case, and has been generally followed in England and in this country. As I understand the instant decision, it does not attempt to justify the doctrine as there laid down, but suggests that any change must be made by the Legislature, and refers as authority therefor to the statement of Mr. Justice Marshall in Tesch v. M. E. R. & L. Co., 108 Wis. 593, 602, 84 N. W. 823, 826 (53 L. R. A. 618), to-wit:

"The doctrine of contributory negligence, applied here, has the sanction of the common law from time immemorial, the support of most of the courts and standard text-writers, and half a century of the adjudications of this court. To change it, otherwise than by legislative enactment, would be judicial usurpation."

Mr. Justice Marshall could not have had the principle announced in this case in mind, because it has never had the sanction of common law, nor of the most, if any, of the standard text-writers, nor the support of many, if any, of the courts outside of Wisconsin, nor has it had the support of this court for half a century. It has never been considered judicial usurpation for the court to reverse itself when it is wrong. As was said by the late Chief Justice Winslow, quoting from another:

"A man should never be ashamed to own he has been in the wrong, which is but saying in other words that he is wiser today than he was yesterday." State ex rel. Postel v. Marcus, 160 Wis. 354, 381, 152 N. W. 419, 429.

I think it would be much better to overrule, if necessary, the decisions that are wrong, rather than to multiply them. Because I think there is no precedent for the decision in this case, as applied to the facts of the case, and, if it be held otherwise, because such precedents are against the overwhelming authorities on the subject, and against "the common dictates of humanity," as was said by Justice Pinney, I respectfully dissent.

NOTE—*Contributory Negligence in Falling Into Elevator Shaft.*—In Stanwood v. Clancey, 106 Maine 72, 75 and 293, 26 L. R. A. (N. S.) 1213, it was held that one was guilty of contributory negligence as matter of law who stepped into a well lighted, unguarded elevator well in an office building with which he was unfamiliar, under the mistaken belief that the opening was the entrance to an office, where the merest attentive glance would have disclosed the truth.

In Machiea v. Hayden, 171 App. Div. 964, 157 N. Y. Supp. 233, where plaintiff knew that the door to an elevator did not operate automatically, and that when he left it he did not close the door, it was held that he could not excuse re-entering the door a moment later without exercising care to see that the elevator was in place.

In Conway v. Wood and Company, 113 Minn. 476, 129 N. W. 1045, where an express wagon driver, in attempting to go from a dimly lighted, wholly unfamiliar baggage room in a hotel to the clerk's desk entered what he supposed to be a passageway and fell into an elevator well, the door of which was open, it was held that this contributory negligence was a question of fact for the jury, and a finding in his favor was sustained.

In Jacobi v. Builders Realty Company, Calif., 164, Pac. 394, it was held that contributory negligence was not established as a matter of law by proof that one either opened the door to an automatic elevator, or stepped through an already open door into an elevator shaft without looking to see that the cage was in place, where the customary use of the elevator warranted the belief that the door thereof could not be opened unless the cage was in the proper place, the court stating that in such a case the question whether the user of the elevator was guilty of contributory negligence because of failure to look should be left to the jury.

In Shoninger Company v. Mann, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097, the contributory negligence of an employee of a tenant, who was sent to an unlighted entryway to deliver packages, in falling into an unlighted and unguarded elevator well, after the elevator, without notice to him, had been moved to another floor, was held for the jury.

In Wheeler v. Hotel Stevens Company, 71 Wash. 142, 129 Pac. 840, it is held that one who, in a place well lighted, opened a substantially closed door to the elevator well, and stepped into the elevator shaft, is guilty of contributory negligence preventing a recovery for injuries sustained.

In a wetter country than our own, a young man was suffering from the well-known effects of "the night before." His wife was worried about his unwonted condition and persuaded him to see a doctor. He did so, and as he was leaving he remarked, "My wife will want to know what I'm suffering from doctor." "Oh, tell her it's syncopation," was the reply.

On reaching home he repeated what the doctor had said. The wife did not know what the word meant, so she looked it up in the dictionary and read, "Syncopation—an uneven movement from bar to bar."—Boston Transcript.

The train robber was holding up a Pullman car: "Out with your dough, I'll kill all men without money and kiss all women."

An elderly gent said: "You shall not touch these ladies!"

An old maid in an upper berth shouted:

"You leave him alone; he's robbing this train."

A lady giving a lecture on spiritualism told how she had lately got into communication with her departed husband, and that he had asked for cigarettes. "But," she added, "I am at loss where to send them."

"Wurra!" exclaimed an Irishman in the audience, "when he did not ask for matches ye should know where to send 'em."

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Actions** — Declaratory Judgments. — Uniform Declaratory Judgments Act June 18, 1923, held not unconstitutional on ground that judgments are merely advisory, that they do not include the right to execution, that it places on courts a nonjudicial duty, or that whole idea of declaratory judgment is an unallowable innovation.—Petition of Kariher, Pa., 131 Atl. 265.

2. **Adverse Possession**—Billboards.—Under Complete Tex. St. 1920, or Vernon's Sayles' Ann. Civ. St. 1914, arts. 5675, 5681, placing billboards on the unoccupied lands of another and there maintaining them for statutory period, without other acts of ownership, held not to constitute adverse possession, where owner of billboards never occupied house on land or placed tenant in same, or otherwise used premises for purposes for which they had theretofore been used.—Burton v. Holland, Tex., 278 S. W. 252.

3. **Automobiles**—Driver Owner's Bailee.—Driver of owner's car, if driving it to sell the car as his own affair, would be owner's bailee, and for negligence of driver owner would not be liable.—Wolcott v. Fellows, N. H., 131 Atl. 352.

4.——Duty of Passenger.—Where passenger in automobile was placed in sudden peril by unexpected act of driver in attempting to beat a train at a grade crossing, she was not required to exercise perfect judgment, and just what she could or should have done in emergency depended on circumstances of particular case and was for jury.—Loughrey v. Pennsylvania R. Co., Pa., 131 Atl. 260.

5.——Duty to Pedestrian.—It is negligence for motorist to run into pedestrian walking along side of unobstructed road with his back toward motorist.—De Grade v. La Coste, R. I., 131 Atl. 193.

6.——"Employee."—One engaged to haul coal with own truck at fixed price per ton, although allowed to haul it himself or employ others, and to come and go as he pleased, and who could be discharged by employer, was "employee" within Workmen's Compensation Act, § 9, defining employee as including every person in the service of another under any contract of hire.—Industrial Commission v. Bonfils, Col., 241 Pac. 735.

7.——Lights.—In action for injuries, where it appeared defendant's automobile had in front only two dash lights, enabling driver to see 10 or 15 feet ahead of car, and a spotlight enabling him to see 23 feet ahead on right side only, held trial court was justified in finding defendant negligent because of inadequate lights.—Stanward v. Yellow Taxicab Co., Cal., 241 Pac. 902.

8.——Negligence.—Where driver of defendant's electric delivery truck wrongfully left truck on left side of street, with "plug" in its place and brakes not set, held that defendant was liable for injury to four-year-old child, who while playing on truck caused it to start.—Campbell v. Model Steam Laundry, N. C., 130 S. E. 638.

9.——Railroad Crossing.—In action for death of passenger, on truck when struck by train on rough crossing, where truck stopped 6 feet from crossing, giving occupants view of track for 700 feet, and then proceeded at 3 or 4 miles an hour, but was struck just before clearing opposite side of tracks, 41½ feet distant, by train approaching from 50 to 55 miles an hour, occupants of truck held not conclusively contributorily negligent, on ground that train must have been in sight when they started to cross; margin of safety being so small as to require submission to jury of question whether train was in sight.—Mills v. Pennsylvania R. Co., Pa., 131 Atl. 494.

10.——Right of Way.—Where, as bus approached street intersection, it slackened its speed apparently to let a passenger alight, but merely slowed up, and driver then drove rapidly into intersection and struck automobile which had started to cross intersection on the right and overturned it, held that jury could reasonably have found that automobile had right of way.—De Marey v. Brugas, Conn., 131 Atl. 392.

11.——Right of Way.—Driver of automobile, reaching street intersection when defendant's truck approaching from right was 75 or 100 feet away, held not contributorily negligent in undertaking to cross street; Ky. St. § 2739g37, giving car first reaching intersection right of way, though other car was approaching from right.—Schneider v. Rolf, Ky., 278 S. W. 100.

12.——Storage.—Presumption is that unidentified person in garage, with whom owner left his automobile, was agent authorized to accept car for storage.—Herschenhart v. Mehlman, N. Y., 213 N. Y. S. 48.

13. **Bailment**—Loss in Mail.—Bank in inland town, not served by express or railway, to whom jeweler had forwarded diamonds by registered mail upon request of cashier, held not liable for loss of diamonds after delivery to United States mails for return by insured parcel post.—Shuttles Bros. & Lewis v. Woodson State Bank, Tex., 277 S. W. 708.

14. **Bankruptcy** — Amenability. — Amenability to Bankruptcy Act (Comp. St. §§ 9585-9656) of a corporation engaged in more than one distinctive line of business, only one of which would subject it to the act, depends on that business which, under all the facts and circumstances, constitutes its chief or principal pursuit.—In re Dairy Marketing Ass'n, U. S. D. C., 8 F. (2d) 626.

15.——Mortgage.—Where mortgage was given on stock in trade, fixtures, and accounts in mortgagor's place of business, or to be placed in his place of business, and mortgagor remained in possession of goods, and continued to make sales therefrom and replenish stock, disallowance by referee in bankruptcy of mortgage as to stock of goods was proper.—In Re Brinson, U. S. D. C., 8 F. (2d) 667.

16.——Payment of Notes.—Under Bankruptcy Act (Comp. St. §§ 9585-9656), bank may apply bankrupt maker's deposits to payment of notes not yet due.—Feakes v. International Trust Co., U. S. D. C., 8 F. (2d) 668.

17. **Banks and Banking**—Acceptance of Check.—Under Negotiable Instruments Law, §§ 134, 187 (Pa. St. 1920, §§ 16126, 16184), telegram of bank, in reply to inquiry, promising to honor check drawn on it, amounted to acceptance thereof, and delay, if any, in presenting such check to bank for payment did not discharge it from obligation to pay.—Bulliet v. Allegheny Trust Co., Pa., 131 Atl. 471.

18.——Act of Bankruptcy.—Bank, whose assets were less than its liabilities, and which voluntarily, by resolution of its board of directors, surrendered its assets to state superintendent of banks for liquidation, under Or. Laws, §§ 6221-6223, held to have made a voluntary assignment for benefit of creditors, and to have committed an act of bankruptcy, defined by Bankruptcy Act, § 3a (4), as amended February 5, 1903 (Comp. St. § 9587), as

affecting priority of debts due the United States, under Rev. St. §§ 3466, 3467, 3468 (Comp. St. §§ 6372-6374).—Bramwell v. United States Fidelity & Guaranty Co., U. S. S. C., 46 S. Ct. 176.

19.——Draft.—Where seller deposited draft and bill of lading with bank, which credited amount thereof to seller on its books, held bank did not become owner of amount represented by draft, but seller still owned proceeds.—Townsend Wholesale Grocery Co. v. Chamberlain C. Co., Mo., 277 S. W. 958.

20.——Draft.—Where drafts on Swedish buyers could not be collected by use of British form of neutrality declaration, authorized by drawer, because of Swedish law, it was duty of collecting bank's correspondent to accept declaration in Swedish form, or give immediate notice of facts to drawer, with recommendation as to course to be followed, and failure to do so was negligence.—Bown Bros. v. Merchants' Bank, N. Y., 213 N. Y. S. 146.

21.—Draft as Preferred Claim.—In action to establish draft as preferred claim against insolvent bank, on ground that defendant fraudulently issued draft, knowing it had insufficient funds in drawee bank to meet it, but there was substantial evidence that it was not fraudulently issued, it was proper for court sitting as jury to allow it as common claim only.—Bank of Callao v. Farmers' Bank, Mo., 277 S. W. 613.

22.——Renewal Note.—Bank, not knowing of or consenting to substitution by its president of renewal note of maker for note on which president was liable as indorser, and which upon such substitution was marked "Paid," held entitled to revive the former note as to the president, regardless of the good faith of the latter or fact that renewal note was good bankable paper.—Bish v. First Nat. Bank, Col., 241 Pac. 537.

23.——Knowledge of Director.—Bank is not bound by knowledge of director, who is also trustee of insolvent corporation, and who at all times knew of financial condition of corporation.—Hoppe v. First Nat. Bank, Wash., 241 Pac. 662.

24.——Title to Consigned Goods.—Where goods were consigned to order of shipper, with directions to notify consignee at place of delivery, and bill of lading indorsed in blank was attached to draft on consignee for price and delivered to bank, and amount of deposit credited to consignor's general account and drawn against by him, bank, in view of Civ. Code 1910, § 5201, acquired title to goods represented by bill which could be asserted against lien of subsequent attaching creditor of consignor.—Strickland v. American Nat. Bank of Nashville, Tenn., Ga., 130 S. E. 598.

25. **Bills and Notes**—Discharge of Indorsers.—Where one of several indorsers of a promissory note, as surety, after indorsing the note, intrusts it to the maker, and the maker, before delivery to the payee, permits such indorser to mark his name off by drawing a pen through it, without the knowledge or consent of the other indorsers, is not such an alteration of the instrument as to discharge the other indorsers, where the payee had no notice or knowledge, when he took the note, of the circumstances under which the name was so marked off.—Healy, Owen-Hartzell Co. v. Montevideo F. & M. E. Co., Minn., 206 N. W. 646.

26.——Holder in Due Course.—A bank which gave its own negotiable certificate of deposit, absolute on its face, for a note for the full amount thereof, held a purchaser for value and in due course, under Rev. St. 1919, § 843, notwithstanding bank may have succeeded in discharging its own paper given for note for less than its face value.—Bank of High Hill v. Rockey, Mo., 277 S. W. 573.

27.——Representations of Payee.—It is no defense to note that maker relied on representations by payee's agent at time of execution, and that it did not contain contract as actually made; note not having been signed under emergency, and maker's failure to read it not having been brought about by fraud of agent.—Spells v. Swift Co., Ga., 130 S. E. 593.

28.——Revenue Stamp.—Under Rev. St. 1919, § 788, a promissory note is complete as a negotiable instrument when made in writing and signed by maker, containing unconditional promise to pay certain sum in money payable on demand at fixed or determinable future time to order or to bearer, and absence of revenue stamp is not an irregularity on the face of the note to awaken suspicion of any infirmity or defect.—Bank of High Hill v. Rockey, Mo., 277 S. W. 573.

29. **Brokers**—Commission.—Where owner promised to pay commission if plaintiff should find a buyer for property, but all that plaintiff did was performed before promise of owner, such past performance of services constituted no consideration for owner's promise.—Field v. Hamm, Mass., 150 N. E., 3.

30.——Commission.—Agent who acts secretly for purchaser of real estate is not entitled to commission from vendor.—Paolino v. Appleton, R. I., 131 Atl. 200.

31.——Carriers of Passengers—Alighting.—Street railroad, in permitting passenger to alight from street car, was not required to have its motorman warn her of danger likely to arise from approaching automobiles, since such danger was as well known to her as to motorman, and was one over which he had no control.—St. John v. Connecticut Co., Conn., 131 Atl. 396.

32.——Certificate of Convenience and Necessity.—Where an operator of motor transportation service under a certificate of convenience and necessity leases motor equipment from a third party and constitutes such third party his fiscal agent, giving him authority to collect all the receipts of such operation and to retain for his services and for rental of motor equipment a stipulated sum of money and after payment of all operating expenses including such per diem to pay the balance of the proceeds of operation to the holder of the certificate and the balance is so paid and out of such balance the operator pays taxes and premiums of indemnity insurance and there is no cessation or interruption of service and the service is at all times efficient, it is error on the part of the public utilities commission to order a revocation of such certificate on the ground of abandonment.—Small v. Public Utilities Commission, Ohio, 150 N. E. 37.

33. **Constitutional Law**—Grand Jury Service.—Where defendant filed a motion to set aside indictment charging sale of liquor, on ground that in selecting grand jury he had been purposely discriminated against, in that for some time persons of the Roman Catholic faith had been intentionally excluded from grand jury service, thereby depriving him of equal protection of law, guaranteed by Const. U. S. Amend. 14, it was duty of court to hear evidence on issue and determine its truth or falsity, especially in view of Const. Tex., Bill of Rights, §§ 4, 6, guaranteeing religious freedom and tolerance.—Juarez v. State, Tex., 277 S. W. 1091.

34. **Contracts**—Commencing Work.—Where a contract provides that the work shall commence "immediately," that word must be construed as such convenient time as is reasonably requisite to do the thing, for the word has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing done.—Mutual Oil & Gas Co. v. Christie, Okla., 241 Pac. 474.

35.——Fraudulent Intent.—Questionnaire intended to bind signers to money obligation, drafted to deceive signers into believing that no obligation was created, and leaving doubt, even after careful study, whether signing carried such obligation, held fraudulent, and unenforceable as contract by assignee, having close relations with assignor, notwithstanding absence of false statements, oral or written.—American T. & H. Direc. Co. v. The Roycrofters, N. Y., 213 N. Y. S. 42.

36.——Selling Agency.—Contract giving exclusive selling agency, and not specifically requiring plaintiff to buy anything except samples, leaving amount of orders to be placed to future agreement, held not enforceable, as too indefinite and lacking mutuality.—Plant Mfg. Corporation v. Renner, N. Y., 212 N. Y. S. 710.

37. **Corporations**—Judgment Not "Debt Contracted."—Judgment on corporation's note is not "debt contracted" during year next preceding time when corporation's annual report should have been filed under C. L. § 2312, so as to make officers and directors individually liable for corporation's debts.—Sherman v. J. S. Brown Mercantile Co., Col., 241 Pac. 724.

38. **Covenants**—Building Restrictions.— Building restriction, prohibiting erection of any building fronting on either side of street nearer than four feet to east lot line or nearer than two feet to west lot line, held breached by apartment covering two lots, though it was not nearer than four feet to east lot line of one lot, and not nearer than two feet to west lot line of the other.—Marrick v. Furnari, Mich., 206 N. W. 505.

39. **Exchanges**—Contract Between Members.—Rule of Texas Cotton Association providing that it shall be a violation for any member of an association to buy or offer to buy cotton after 8 o'clock p. m., except in cases of unavoidable delay in telephone or telegraphic service, held not to invalidate contract between members of association finally completed after 8 o'clock.—Western Union Telegraph Co. v. Gardner, Tex., 278 S. W. 278.

40. **Explosives**—Duty to Employees.—It is error to give a peremptory instruction to find for the defendant, where the proof for the plaintiff shows that dynamiting operations were being carried on in proximity to operations in setting up a dredge boat, and that such crew working on the dredge boat were within the range of the explosion ordinarily or frequently shown to exist, and where the proof shows that some of the crew engaged in such work did not hear the warning on account of the noise in the operation of the work in which they were engaged, although other testimony showed that some of the men so engaged did hear the warning.—Evans v. Brown, Miss., 106 So. 281.

41. **Highways**—Benefits to Property Owners.—Where road improvement district is not created by legislature, and there is no legislative determination that property will be benefited, it is essential to due process of law that property owners be given notice and opportunity to be heard on question of benefits.—Browning v. Hooper, U. S. S. C., 46 S. Ct. 141.

42. **Homicide**—Driving Car While Intoxicated.—Where one operates an automobile upon a public street or highway of this state at a rate of speed penalized by statute, or while he is under the influence of intoxicating liquors, and, in consequence thereof, he kills a human being, without any intention to do so, he is, under that view of the case most favorable to him, guilty of involuntary manslaughter.—Black v. State, Ga., 130 S. E. 591.

43. **Innkeepers**—Liability for Acts of Guest.—Proprietor must protect strangers from acts of guest while latter are in hotel, if he has knowledge of their intended conduct.—Wolk v. Pittsburgh Hotels Co., Pa., 131 Atl. 537.

44. **Insurance**—"Accidental Means."—One who by voluntary exertion in effort to crank automobile, caused an acute dilatation of his heart and muscles thereof, from which he died within two days, held not to have sustained injury as result of "external, violent, and accidental means," within meaning of insurance policy.—Carswell v. Railway Mail Ass'n, U. S. C. C. A., 8 F. (2d) 612.

45.——Application Not Part of Contract.—In view of Civ. Code 1910, § 2471, where copy of application is not attached to policy of life insurance, it is not part of contract, and statements therein are not warranties, falsities of which avoid risk as matter of contract.—Couch v. National Life & Accident Ins. Co.—Ga., 130 S. E. 596.

46.——False Representations. — False warranty that defendant has not named disease is good defense to action on benefit certificate regardless of whether statement was intentionally false or made in bad faith.—Security Benefit Ass'n v. Talley, Col., 241 Pac. 721.

47.——Forfeiture.—In action on life insurance policy, evidence of statements of assistant secretary of company to whom plaintiff's attorney was referred for information on subject, concerning conversation with insured relating to notes given to pay first premium, was admissible as showing attempt to collect premium after date defendant claimed forfeiture of policy for failure to pay premium had occurred.—O'Donnell v. Kansas City Life Ins. Co., Mo., 277 S. W. 973.

48.——Indemnity Bond.—Where indemnity bond, conditioned that it would be invalid unless signed by employee, had not been so signed at time of his alleged defalcations, it was unenforceable despite procurement of employee's signature thereafter.—Bartlett v. Massachusetts Bonding & Ins. Co., Mass., 150 N. E. 94.

49.——Insurable Interest.—Husband had an insurable interest in barn belonging to his wife, where they were living on the land as a home and were farming it as a means of livelihood, and maintenance of barn was essential to that purpose, and hay in barn was product of their joint labor; "interest" not being limited to property or ownership in subject-matter of insurance.—Washington Fire Relief Ass'n v. Albro, Wash., 241 Pac. 356.

50.——Members of Household.—Under robbery policy insuring permanent members of insured's household over 18 years old, with certain exceptions, held that insured was not entitled to recover for robbery of his wife, who was under 18.—Yankowitz v. Standard Accident Ins. Co., N. Y., 213 N. Y. S. 41.

51.——Proof of Loss.—Proof of negotiations for the settlement of a loss, or of an offer to pay the loss, warrants a jury in finding that there was a waiver of formal notice and proofs of loss.—Reliance Motor Co. v. St. Paul Fire & Marine Ins. Co., Minn., 206 N. W. 655.

52.——Recovery on Policy.—Suit held properly brought to recover on automobile insurance policy, as against contention suit should have been brought in court of equity for reformation of policy, where only error in description was misstatement of motor number.—Lorenz v. Bull Dog Automobile Ins. Ass'n, Mo., 277 S. W. 596.

53.——Use of Damaged Property.—In an action upon a tornado insurance policy, limiting the insurance to the cash value of the property at the time of the loss, but not beyond the sums insured, and reserving to the insurance company the right to take all or any part of the articles damaged at their ascertained or appraised value, and to repair, rebuild, or replace the property damaged or destroyed, it is held not to be incumbent upon the plaintiff to show that the materials in the building could not be advantageously used.—Sperry v. North River Ins. Co., N. D., 206 N. W. 230.

54.——Violation of By-Laws.—Evidence that small quantities of coal oil and gasoline were temporarily kept in building for consumption in oil stove and gasoline lamps held not to establish a storing of gasoline or coal oil in violation of by-law of mutual insurance company doing business under Rev. St. 1919, §§ 6464-6468.—I. H. Lawrence & Son v. Merchants' & M. Mut. Aid Soc., Mo., 277 S. W. 588.

55. **Internal Revenue** — Consulting Engineers. — Consulting engineers, engaged to advise states and subdivisions thereof with reference to water and sewage projects, not required to take any oath or forego other employment, held not "officers" of state or subdivision, whose earnings were exempt from taxation, under War Revenue Act Oct. 3, 1917, § 201(a); "office" being a public station, conferred by appointment of government, embracing tenure, duration, emolument, and duties fixed by law.—Metcalf v. Mitchell, U. S. S. C., 46 S. Ct. 172.

56. **Interstate Commerce**—Installing Machinery.—Transaction for sale and installation, by a foreign corporation, not authorized to do business within state, of machinery and equipment for domestic corporation, held to constitute interstate commerce.—Majonnier Bros. Co. v. Detroit Milling Co., Mich., 206 N. W. 525.

57.——Safety Appliance Act.—The liability of an interstate railway company, under the federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.), to a switchman injured through a violation of the act, exists, although the employee, when injured, was engaged in taking the defective car to the repair track for repairs.—Schendel v. Chicago, M. & St. P. Ry. Co., Minn., 206 N. W. 436.

58. **Intoxicating Liquors**—Search Warrant.—Affidavit for search warrant, "made on the personal knowledge of affiant" (a prohibition agent), by reason of having in his possession a formal affidavit made by a police officer, which set forth a conversation between such officer and defendant, to effect that defendant had on premises involved "two safes which contained bonded liquor, and which are known to be untax-paid," held insufficient on

which to base finding of probable cause, under National Prohibition Act, tit. 2, § 25 (Comp. St. Ann. Supp. 1923, § 10138½m), and Espionage Act, tit. 11, §§ 3, 4, and 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼c-10496¼e).—**Wagner** v. United States, U. S. C. C. A., 8 F. (2d) 581.

59. **Landlord and Tenant.**—Duty to Guest.—Where evidence showed that for considerable time before lodgers came to live in defendant's apartment, whenever there was rainfall or thaw, water flowed from piazza of second story on steps, and there was accumulation of ice thereon, landlord owed to lodgers no duty to change construction of her tenement for their convenience.—**Webber** v. Sherman, Mass., 150 N. E. 89.

60.——Liability for Act of Tenant.—When injury occurs through act of occupier of an apartment house, which is in no way connected with the conduct of the establishment, owner of apartment house would not be responsible for injury occurring from negligent condition of tenant's window sill or for acts committed by tenant in course of his occupation, nor for similar conditions where occupant's use is partially for light-housekeeping purposes and partly for hotel.—**Wolk** v. Pittsburgh Hotels Co., Pa., 131 Atl. 527.

61. **Master and Servant**—Act of Servant.—Act of servant in inserting fraudulent charges for goods not contained in a bill already indorsed as correct, which constituted forgery, whether servant did so before or after indorsement of plaintiff's receiving clerk, suspended relationship of master and servant for time being, and while so engaged servant was not acting within course of his employment, and hence master was not liable for his peculations from plaintiff.—Brooks v. Gray-Von Allmen Sanitary Milk Co., Ky., 277 S. W. 816.

62.——Brakeman Not Repairman.—Where train broke apart on bridge through defective coupling, and brakeman, in attempting repairs so that train could proceed, fell from bridge and was injured, held that brakeman was engaged in coupling cars, within Safety Appliance Act March 2, 1893, § 2, as amended by Act March 2, 1903 (Comp. St. § 8606), and was not engaged in repair work, under Supplemental Safety Appliance Act April 14, 1910, § 4 (Comp. St. § 8621).—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, U. S. S. C., 46 S. Ct. 129.

63.——Defective Coupling.—Where train broke apart on bridge because of defective coupling, and brakeman, in attempting repairs so train could proceed, fell from bridge and was injured, such defective car was still "in use" at time of injury, within Safety Appliance Act March 2, 1893, § 2, as amended by Act March 2, 1903 (Comp. St. § 8606), although it was then motionless.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, U. S. S. C., 46 S. Ct. 129.

64.——Knowledge of Disease.—Where employee was an epileptic, employer's knowledge of his disease was a circumstance in light of which employer's conduct in furnishing a place for him to work was to be judged.—Monteith v. Manchester Rendering Co., N. H., 131 Atl. 440.

65. **Municipal Corporations**—Care of Playground.—In action for death of child caused while playing in a swing on playground maintained by city, evidence that swing was in defective and dangerous condition, and that city knew of it, held for jury.—Ramirez v. City of Cheyenne, Wyo., 241 Pac. 710.

66.——Crossing.—It is the duty of a driver approaching a crossing to be highly vigilant and to maintain such control of his truck that on the shortest notice it could be brought to a standstill, thus avoiding injury to pedestrians, and whether truck driver performed such duty is for the jury.—Parznik v. Central Abattoir Co., Pa., 131 Atl. 372.

67.——Zoning Ordinance.—An unreasonable and arbitrary building restriction, constituting abuse of discretion by city council, is void, and aggrieved owner of property is entitled to remedy in court of equity, regardless of whether provision is made for such remedy in statute or ordinance.—City of Little Rock v. Pfeifer, Ark., 277 S. W. 883.

68.——Zoning Ordinance.—Acts 1924, 3d Extra. Sess. No. 6, authorizing zoning regulations by cities, and ordinance of city of Little Rock pursuant thereto, regulating erection of gasoline and oil filling stations, automobile repair garages, store buildings, or any other building for business purposes, in what is known as residence district of city, held valid.—City of Little Rock v. Pfeifer, Ark., 277 S. W. 883.

69. **Navigable Waters**—Control by Congress.—The constitutional power of Congress to regulate commerce includes power to control for purposes of commerce all navigable waters which are accessible to it, whether within or without the limits of the state, and to adopt all appropriate measures to free such waters from obstructions to navigation, and preserve and even enlarge their navigable capacity.—State of New Jersey v. Sargent, U. S. S. C., 46 S. Ct. 122.

70. **Negligence**—Care of Store Floor.—In action for injury to customer from slipping on floor of store, Supreme Court could not find as matter of law that presence of peanuts on floor did not constitute source from which dangerous condition might arise.—Langley v. F. W. Woolworth Co., R. I., 131 Atl. 194.

71.——Elevator Shaft.—The test of conduct of one killed by falling down elevator shaft on opening unlocked door having no warning sign thereon is that of ordinary man under same circumstances, which is always to be resolved by jury or trier.—Bunnell v. Waterbury Hospital, Conn., 131 Atl. 501.

72.——Invitee.—One entering dimly lighted cloak room used in connection with public assembly hall rented by defendant, while seeking toilet, and opening door therein leading into elevator shaft, held neither a trespasser nor a licensee, but an invitee, to whom defendant owed duty of refraining from willfully or wantonly injuring him, and also larger duty of exercising reasonable care to have cloak room safe for his use.—Bunnell v. Waterbury Hospital, Conn., 131 Atl. 501.

73.——Origin of Fire.—It is actionable negligence for electric light and power company to permit inflammable grass and vegetable matter to accumulate on rights of way maintained for power transmission line, though fire actually results from lightning striking transmission line and causing insulating material to melt and fall in molten mass into such inflammable matter; the injury not being due solely to act of God.—Lawrence v. Yadkin River Power Co., N. C., 130 S. E. 735.

74. **Oil and Gas**—Enforceable Contract.—Where plaintiffs loaned defendant $100 in consideration of contract whereby defendant was to furnish plaintiffs with four wells to drill at stipulated price, upon plaintiffs' offer to perform their side of contract, contract became mutually binding and enforceable and plaintiffs entitled to damages for breach.—M. M. Bryant & Bro. v. Reamer, Ky., 277 S. W. 826.

75.——Lease.—Assignees of oil leases held not entitled to damages because of actions to quiet title, brought by lessors in good faith, in belief that assignors had not complied with terms of leases and that assignees had no legal right thereto because assignment was without lessors' consent.—Alpine Petroleum Co. v. Lewis, Cal., 241 Pac. 910.

76.——Lien.—Section 7464, C. O. S. 1921, providing for an oil and gas lease lien, requires that there be a contract, express or implied, between the parties? Such contract may be written or oral, or a written contract altered by an executed oral one.—Mutual Oil & Gas Co. v. Christie, Okla., 241 Pac. 474.

77.——Lien.—Section 7464, C. S. 1921, contemplates the improvement of an oil or gas lease by furnishing labor, or material, used in digging, drilling, torpedoing, completing, operating, or repairing of any oil or gas well, or for the construction or putting together machinery used for such purpose, and does not cover labor or material furnished and used, applied to and performed in, constructing, repairing, and operating a gas pipe line and gas distributing system in and adjacent to a municipality.—McEwen Mfg. Co. v. Anadarko Producers' Gas & Oil Co., Okla., 241 Pac. 493.

78.——Title to Lease.—The sale and written assignment of a number of oil and gas leases implies a warranty of title in the assignor when the assignment specifically declares that the assignor is the owner of the leases.—Daggett v. Four Hundred Oil & Gas Co., Kan., 241 Pac. 467.

79.—**Restricted Lands.**—Leases for oil and gas purposes on restricted lands may be made with the approval of the Secretary of Interior, under regulations prescribed by him and not otherwise.—March Oil Co. v. Lee, Okla., 241 Pac. 804.

80. **Physicians and Surgeons**—Negligence.—Where surgeon correctly ascertained location and nature of fracture of femur, his failure to use X-ray was not negligence.—Wright v. Conway, Wyo., 241 Pac. 369.

81. **Principal and Agent**—Agent's Interest.—Where an agency is coupled with an interest, and the principal gives to the agent unreasonable instructions detrimental to the agent's interest, the agent may disregard the instructions and act for himself, provided he acts in good faith, and the principal would be bound thereby.—Southern Trading Corporation v. Benchley Bros., Ga., 130 S. E. 691.

82.——**Husband as Agent.**—Where plaintiff's husband, as manager of defendant's real estate business, negotiated surrender of land contracts by defendant's customers and their sale to plaintiff, who purchased in good faith, held she was not chargeable with any fraudulent conduct of plaintiff toward his employer in the transaction.—Stolberg v. Oakman, Mich., 208 N. W. 488.

83. **Railroads**—Crossing.—The fact that a train which is standing upon a side track near a highway crossing, but no part of which rests thereon, is so placed as to obstruct the view of a train approaching on the main track cannot constitute an independent ground of negligence upon which to base liability of the company in an action against it growing out of a crossing collision. In such a case the court will not enter upon the inquiry whether the needs of the road with respect to its operation might have been met by placing the standing train in a different position such as to afford a view of an approaching train at a greater distance.—Adams v. Missouri-Kansas-Texas R. Co., Kan., 241 Pac. 1086.

84.——Assumption of Risk.—Switchman held not to have assumed risk of injury arising from being knocked off freight car by roof of shed in close proximity to track.—Louisville & N. R. Co. v. Lewis, Ky., 278 S. W. 143.

85.——"Attractive Nuisance."—A standing freight car is not a dangerous piece of machinery within the attractive nuisance class, which railroad is required to guard against trespassing children.—Smith v. Hines, Ky., 278 S. W. 142.

86.——Warning.—Instruction, predicating negligence on finding that train operatives negligently failed to give deceased any warning of its approach, held not erroneous, as requiring finding that deceased was warned, regardless of whether general warning was given.—Ward v. Missouri Pac. Ry. Co., Mo., 277 S. W. 909.

87. **Sales**—Anticipatory Breach.—Seller's threat to cancel contract providing for payment against shipping documents unless buyer furnished guaranty of payment before specified time constituted anticipatory breach, where no guaranty was furnished.—John Dimon Corp. v. Federal S. Refining Co., N. Y., 213 N. Y. S. 106.

88.——Implied Warranty.—Gen. Laws 1909, c. 261, § 15, subsec. 1 (now Gen. Laws 1923, § 4441, subsec. 1), corresponding to 56 and 57 Victoria, c. 71, § 14, subsec. 1, and Pub. Laws 1908, c. 1548, providing that, where buyer informed seller of particular use to which article is to be put, and relies on seller's skill and judgment, there is implied warranty of reasonable fitness for such purpose, applies to dealer in sale of fur coat, so as to create an implied warranty of merchantability.—Keenan v. Cherry & Webb, R. I., 131 Atl. 309.

89.——"Instance."—The word "instance," as used in complaint in action to recover amount due "for goods, wares, and merchandise sold by plaintiff to the defendants or at their instance or request," held subject to construction as meaning "solicitation" or "suggestion."—Miller v. Mutual Grocery Co., Ala., 106 So. 396.

90. **Seamen**—"Watches."—Under Seamen's Act March 4, 1915, § 2 (Comp. St. § 8363b), sailors must be divided into watches of equal or approximately equal numbers, notwithstanding there may be insufficient work to keep night watch busy; and, where watches are not so constituted, a seaman is entitled to discharge and pay earned, in view of the long-established meaning of the term "watch," and the distinction between "sea watch" and "anchor watch."—O'Hara v. Luckenbach S. S. Co., U. S. S. C., 46 S. Ct. 157.

91. **State Laws**—Hours of Service.—Comp. St. Okl. 1921, §§ 7255, 7257, providing an eight-hour day for persons employed by or on behalf of state, and "that not less than the current rate of per diem wages in the locality" shall be paid to laborers, workmen, etc., held so uncertain in its use of terms "current rate" and "locality" as to be violative of due process clause.—Connally v. General Const. Co., U. S. S. C., 46 S. Ct. 126.

92.—— Interstate Motor Transportation. — Ohio Motor Transportation Act (Gen. Code, § 614-84, as amended by 111 Ohio Laws, p 515), in so far as it permits denial of certificate of public convenience and necessity to common carrier, purely in interstate commerce, held unconstitutional.—Red Ball Transit Co. v. Marshall, U. S. D. C., 8 F. (2d) 635.

93. **Sunday**—Picture Show.—Conviction for violation of Sunday Law (Rev. St. 1919, § 3596), by operation of picture machine and piano, held authorized; such not being household offices of daily "necessity."—State v. Kennedy, Mo., 277 S. W. 943.

94. **Taxation**—Refund.—Legislature has no power to compel return of taxes legally collected.—Board of Com'rs v. Blue, N. C., 130 S. E. 743.

95.——Marketing Associations.—A nonprofit cooperative association, having no capital stock, organized under the statute to market for their benefit the wheat grown by its members, is not a merchant within the term as defined in the taxation statute, and is not required to pay taxes on account of holding such wheat, either on the basis of the average amount held during the year or otherwise; the growers of the wheat as its beneficial owners being liable for whatever taxes its ownership involves.—Kansas Wheat Growers' Ass'n v. Board of Com'rs of Sedgwick County, Kan., 241 Pac. 466.

96. **Vendor and Purchaser**—"All Right, Title and Interest."—Where trustee under mortgage deed agreed to sell to plaintiff all right, title, and interest which it had in property obtained by foreclosure proceedings, and also in all property taken possession of under deed, words "all right, title, and interest" embraced only what trustee could lawfully have claimed under foreclosure, and did not import implied warranty of ownership.—United Sugar Co. v. Guaranty Trust Co., Mass., 150 N. E. 95.

97. **Workmen's Compensation**—Maritime Service. —Where duties of employee required him to do work partly on shore and partly on vessel, his recovery for injuries received on shore, even though his time could not be segregated under maritime amendment of 1919 (Laws 1919, p. 134) to Workmen's Compensation Act, is governed by common law, and for injuries received on navigable water by the maritime law.—McEachran v. Rothschild & Co., Wash., 241 Pac. 969.